

REPORT
OF THE WORKING GROUP
ON THE SUNSET OF U.S. DISTRICT
COURT BID PROTEST JURISDICTION

GOVERNMENT CONTRACTS SECTION
FEDERAL BAR ASSOCIATION

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Introduction

The Pending Sunset of Jurisdiction

Pursuant to Administrative Dispute Resolution Act of 1996, Public Law 104-320 (Oct. 19, 1996), the U.S. Court of Federal Claims and the U.S. District Courts were given concurrent jurisdiction over certain actions which are generically called bid protests. This jurisdiction covers:

an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. [28 U.S.C./1491(b)(1)].

Section 12(d) of the Act provides that the jurisdiction of the district courts over such actions will end (sunset) on January 1, 2001. However, Congress qualified its mandate by requiring a review of the issue before the sunset takes place. Section 12(c) of the Act requires the General Accounting Office to undertake a study to determine whether concurrent jurisdiction [of the Court of Federal Claims and the district courts] is necessary. GAO is to specifically report on the impact of sunset on the ability of small businesses to challenge violations of Federal procurement law. *Id.* The Government Contracts Section of the Federal Bar Association convened a Working Group to review these matters and, if appropriate, contribute to the dialogue by providing comment to GAO.

The Context and Makeup of the Group

The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government. The Government Contracts Section of the Federal Bar Association, which consists of attorneys -- both public sector and private sector -- involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit public comments on pending legislation, regulations, and procedures relating to Federal procurement. These comments have been prepared by a Working Group of the Government Contracts Section, with the direction and approval of Section leadership. The views expressed in these comments reflect the position of the Working Group. They have not been considered or ratified by the Federal Bar Association as a whole, or by any Federal agency or other organization with which Section or Task Force members are associated through their employment or otherwise.

The Working Group on the Sunset of District Court Bid Protest Jurisdiction was a balanced group of experienced Government contract attorneys from the public and private sectors. All have had years of experience in the practice of Government contract law and in bid protest type disputes. Most are experienced with multiple forums. Five members were from the private

sector and four from Government.¹ The four Government sector participants were drawn from both military and civilian agencies. The five private sector participants had experience in law firms of differing sizes and degrees of specialization.

The Working Group determined that its methodology would not depend upon surveys and quantified studies, but rather on the accumulated expertise and experience of its members. The members approached this task, not as the representatives of any constituency, but rather as professionals interested in improving the administration of justice. We all recognized, however, that our individual perceptions had been shaped by our experience as advocates for our clients.

Finally, our efforts had no preconceived outcome. We were free to examine any factors, and to reach any conclusions.

MEMBERS OF THE WORKING GROUP

Chair: Joseph J. Petrillo
Petrillo & Powell, PLLC

Seth Binstock
Social Security Administration

Donald Suica
Internal Revenue Service

Alan C. Brown
McKenna & Cuneo LLC

Timothy Sullivan, Esq.
Adduci, Mastriani & Schaumberg LLP

Jeff Kessler
Department of the Army

Richard J. Webber
Arent Fox Kintner Plotkin & Kahn LLC

Mark Langstein
Department of Commerce

Donna L. Yesner
Pepper, Hamilton LLP

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A fifth attorney from the Department of Justice provided technical support and input, but did not consider it appropriate to participate as a member.

1. CONSIDERATIONS RELEVANT TO THE SUNSET OF DISTRICT COURT BID PROTEST JURISDICTION

There was a general consensus about the considerations which were relevant to this topic, although there were differing opinions about each of them. In general, we examined (1) the degree of expertise of the forum, (2) the goal of uniformity of the law, (3) the number of cases filed, and (4) the ease of access to each forum. In addition, we attempted to examine an elusive concept, the quality of justice available from each forum. Each area is discussed below.

Expertise

With respect to expertise in the substantive law, the considerations are fairly clear-cut. Today, judges in the Court of Federal Claims (CFC) do have repeated and substantial exposure to issues of Government contract law. Prior to the enactment of the Administrative Dispute Resolution Act of 1996, *supra*, the contracts caseload of the CFC consisted overwhelmingly of appeals under the Contract Disputes Act of 1978, 41 U.S.C./601 *et seq.* Only a few cases each year were filed under the court s bid protest jurisdiction, because cases under that jurisdiction had to be filed before award.

The bid protest caseload has increased since the new and expanded jurisdiction became effective. Moreover, the broad reading given the statute by the Court of Appeals for the Federal Circuit suggests that other cases now filed in district courts can, and will, be filed instead in the CFC. Therefore, the judges of the Court of Federal Claims have developed, and will continue to develop, specialized expertise in Government contract law, both in general, and with respect to bid protest matters.

On the other hand, district court judges adjudicate a much wider variety of controversies. Their caseload includes criminal matters under Federal law, and common-law suits filed under their diversity jurisdiction. Accordingly, Federal district court judges are, or quickly become, legal generalists.²

In one area of the law -- review of agency action under the Administrative Procedure Act, 5 U.S.C.//706 (APA) -- some panel members felt district court judges had superior expertise. The standard of review prescribed by this Act for agency action generally is also the standard of review employed in bid protest suits since their inception in the landmark case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (1970). It continues to be the standard of review enshrined in statute.³

Some panel members believe that, because Federal district court judges must apply these tests to a variety of challenged actions by Federal agencies, they are more comfortable with this function, and have greater competence in it than their counterparts on the CFC. Other panel members, however, believed that the substantive expertise of CFC judges in Government

² One panel member noted that it may be easier to obtain discovery in district court bid protest suits than at the CFC. This may be a by-product of the need of district court judges to have more explanation of the record than their CFC counterparts.

³ 28 U.S.C./1491(b)(4).

contract concepts, procedures, and legal principles more than made up for any disparity in the area of APA review. These members also point out that the CFC judges are not unfamiliar with APA review, and will doubtless acquire more familiarity with it as they continue to decide bid protest suits.

Uniformity of the Law

The goal of uniformity of the law is not necessarily an end in itself. As some panel members pointed out, having different forums decide cases with potentially different results provides a laboratory in which the law can develop through a diversity of views and opinions.⁴ However, there was a general consensus that clarity and certainty in the law are desirable because they enable lawyers to be effective counselors to their clients, and promotes the efficient use of resources.

A number of factors affect the degree of consistency. At first blush, it is logical to presume that terminating the jurisdiction of district courts will lead to greater uniformity, simply because of the reduction in the number of deciding judges. There are over 80 district courts, each with multiple judges. The Court of Federal Claims, however, has only 22 judges. But numbers alone do not tell the full story. Both in the district courts and at the CFC, the decision of one judge is not binding on others. Other than binding precedent from appellate tribunals, there is no guarantee of consistency between or among judges at the trial court level.

However, the decisions of appellate courts, which are binding, do promote consistency. Decisions of the district courts are appealed to twelve different Circuit Courts of Appeals. Decisions of the Court of Federal Claims are appealed only to the Federal Circuit.⁵ Therefore, the sunset of district court jurisdiction will tend to increase uniformity, because only one appellate court will be in charge of this area of the law. This effect will only be felt in the long run, however, because of the relatively few bid protest court cases filed, and the even fewer number of appellate decisions in such cases.

Other important factors tend to foster uniformity, in spite of the multiplicity of district courts. First, all courts must interpret the same statutes and regulations in this area. Second, the largest body of case law in the area of award controversies results from decisions of the General Accounting Office. Over a thousand protests are filed at GAO each year, hundreds of which result in published decisions. Although no court considers such rulings binding, GAO possesses acknowledged expertise in this area, and its rulings have at least a persuasive value. Third, both the district courts and the CFC apply the same standards for interlocutory injunctive relief. Finally, although the Circuit Courts of Appeals are not bound by each other's rulings, they are given some weight in the decisionmaking process.

⁴ For instance, after the decision of the Court of Federal Claims in *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997), the General Accounting Office reversed its prior rule authorizing the addition of non-schedule items to orders under the Federal Supply Service. See *Pyxis Corp*, B-282469, *et al.*, July 15, 1999.

⁵ Of course, the U.S. Supreme Court is the ultimate appellate body for all these circuit courts of appeals, but it rarely agrees to hear government contract cases and does so only in the most important areas. See *United States v. Winstar Corp.* 518 U.S. 839 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

The Number of Cases Filed.

One factor which should be considered in connection with the sunset of district court bid protest jurisdiction is the number of cases which might be affected. In considering this factor, we reviewed statistics provided by the Department of Justice. According to the best records available (which might not be complete), there were 29 such suits filed in district court in fiscal year 1997 and 40 in fiscal year 1998, for a two-year total of 69. About 40% of these were filed in two district courts: Washington, D.C. and the Eastern District of Virginia.⁶

For purposes of comparison, a total of 82 bid protest cases were filed during the same two fiscal years in the Court of Federal Claims.

There was a consensus among the members of our group that these numbers were fairly insignificant compared with the volume of Federal court litigation generally. Therefore, the sheer number of cases is not a significant factor.⁷

Access to the Forum.

Unquestionably, it is more convenient for those located far from the Nation's Capital to have access to their own district courts. The sunset of district court litigation will obviate this possibility.

Again, there are considerations which mitigate and detract from this factor. The ability of a bidder to use its local district court depends upon being able to have jurisdiction over the parties. In addition, the district court must be an appropriate venue for the matter.

The Federal Government resides in every district, but it is sometimes desirable, or even necessary, for the plaintiff to bring private parties into the action. This is most notably true for the contract awardee. See *A. & M. Gregos Inc. v. Robertory*, 384 F.Supp. 187, (E.D. Pa. 1974) (successful bidder is a necessary party under Rule 19). The plaintiff's local district court might not have personal jurisdiction over the awardee or another interested private party.

In the case of the Court of Federal Claims, however, jurisdiction is nationwide, so the limitations of local jurisdiction and venue which arise in the case of the district courts are not pertinent.⁸ The Court of Federal Claims has made some efforts to accommodate out-of-town counsel, for instance, by holding status conferences telephonically. More can be done in this regard, however, and the Court should consider taking additional steps.⁹

⁶ The headquarters of the Department of Defense is located in the Eastern District of Virginia.

⁷ The panel was divided on where it was easier to obtain a quick hearing on a motion for interlocutory injunctive relief. One member's experience was that some district court dockets were very crowded, making it difficult to get a prompt hearing on a motion for a preliminary injunction. Another panel member observed that it was easier to get a quick hearing on a motion for a temporary restraining order at district court than at the CFC.

⁸ Contract awardees are generally permitted to intervene in bid protest suits, although it is the practice of one judge to permit them only *amicus* status. This is a matter which the Court of Federal Claims might wish to address in its rules.

⁹ These might include videoconferencing, electronic filing, *etc.*

In addition, those seeking to do business with the Federal Government already have an expectation of having to come to Washington for certain purposes. The largest bid protest forum, the General Accounting Office, is located in Washington, D.C. Moreover, all fora hearing appeals under the Contract Disputes Act the various boards of contract appeals¹⁰ and the Court of Federal Claims are all in the Washington, D.C. area. Finally, a substantial percent of district court bid protest suits are filed in the Washington, D.C. area.

The Quality of Justice

We also considered an elusive factor which we referred to as the quality of justice. Specifically, are there tendencies in the district courts and the Court of Federal Claims which affect the ability of these fora to provide an effective adjudication of bid protest issues? In the main the similarities of these fora outweigh their differences. They have very similar procedures, and can grant the same relief. They apply the same substantive law. As discussed below, there appear to be no differences in the scope of their subject-matter jurisdiction.

One notable difference is that, in the district courts, the Government is represented by an Assistant U.S. Attorney, whereas representation before the CFC is centralized in a specialized part of the Department of Justice, the Commercial Litigation Branch of the Civil Division. Assistant U.S. Attorneys, like the court before which they appear, tend to be generalists. Given the low number of Government contract cases adjudicated at the district courts, there seems to be little chance for assistant U.S. attorneys to develop substantive expertise in this area of the law.

On the other hand, lawyers who work in the Commercial Litigation Branch are likely to have a substantial and continuing involvement with Government contract cases. Thus, they either have a good working knowledge of Government contract legal principles, or develop it quickly. Moreover, they work together under common management, which makes it easier to assure uniformity of quality and consistency in matters of policy. It should be noted that some of our group from the private bar perceived a tendency for the lawyers of this office to interpose repetitive and sometimes questionable procedural obstacles for those bringing bid protest suits, but that was not a unanimous view.

A Working Group member working with the Government pointed out that agency counsel are often located in the Washington, D.C. area, especially for civilian agencies. Thus, it was more convenient and less expensive for the Government to defend a bid protest suit brought there.

Another factor worthy of mention is that the district courts are the only forum established under Article III of the Constitution which can hear and resolve disputes about the procurement process. Unlike their counterparts on the district court, the judges of the Court of Federal Claims do not have lifetime appointments, although their period of tenure is long (15 years).

10

Like the Court of Federal Claims, judges of the boards of contract appeals travel and will conduct hearings away from Washington, D.C. This is not the practice of the General Accounting Office.

The purpose of Article III protections, like lifetime appointment, is to have a judiciary which is independent of pressure from either of the other branches. Such independence is most valuable when the matter before a court is a dispute between the sovereign and a citizen. Preserving review of Executive branch action by an Article III court, therefore, is consistent with the design of the Constitution. In the bid protest context, there are two ways to achieve this goal. One is to repeal the sunset of district court jurisdiction. The other is to elevate the judges of the U.S. Court of Federal Claims to Article III status.¹¹

Some observers -- including a minority of the Working Group -- believe that they have discerned another difference between the judges of the district courts and those of the CFC. The former are thought to be more responsive to appearances of impropriety, and the latter are said to be less responsive to such arguments, and more interested in resolving cases on technical considerations of statute and regulation. If this assertion is true,¹² the reasons for it are difficult to understand.

One factor which the members of the panel thought might have been exaggerated was the supposed favoritism which a district court judge might show a local company. In general, the panel members felt that this was not a significant factor in bid protest litigation. Moreover, restrictions on venue and jurisdiction sometimes make it impractical to file suit in a disappointed bidder's local district court, as noted above.

¹¹ One judge of this Court has noted that there is no assumption of reappointment after the expiration of a 15-year term, and that the Justice Department is active in the reappointment process. Therefore, he concluded, . . . a judge who wants to remain active must obtain the support of the representative of one of the litigants in all cases before the court, neither a seemly nor desirable situation. Bruggink, E., *A Modest Proposal*, 28 *Pub. Cont. L. J.* 529, 541-42 (1999).

¹² No quantitative or other analytical data seems available to confirm or deny this assertion, and it is difficult to imagine how such data could be developed.

Conclusions

If district court jurisdiction sunsets, is there a need for further legislation?

One area of concern is whether the sunset of district court jurisdiction will extinguish the ability of Federal courts generally to review certain procurement-related questions. In other words, will the district courts lose jurisdiction over a type of case or controversy which the Court of Federal Claims cannot hear and resolve? Areas where this might happen include: review of agency decisions to override the automatic statutory stay during GAO protests, debarments and suspensions, decisions to perform work in-house or to contract-out, or so-called reverse protests.¹³

At first, there was concern that this might be the case. However, a decision of the Court of Appeals for the Federal Circuit has alleviated anxiety on this point. See *Ramcor Services v. United States*, 185 F.3d 1286 (C.A.F.C. 1999). In this opinion, which overturned the ruling below, the appellate court gave a broad reading to the statute conferring jurisdiction of bid protest suits on the Court of Federal Claims. The words any alleged violation of statute or regulation in connection with a procurement or a proposed procurement are to be taken literally, and so it is unlikely that the sunset of district court litigation will extinguish any type of suit which can be brought now. Thus, there appears to be no immediate need for further legislation if the district courts lose their jurisdiction over bid protest suits.

The impact on small business

One of the factors which GAO is to consider is the impact of sunset on the ability of small businesses to challenge violations of Federal procurement law. Pub. L. No. 104-320, *supra*, section 12(c). As noted above, small businesses now invoke Government contracts fora in the Washington, D.C. area on a regular basis. Moreover, many of the plaintiffs filing bid protest cases before the Court of Federal Claims are, or appear to be, small businesses. To the extent that small businesses might want to be represented by their local counsel, the CFC Rules permit this.¹⁴ Finally, a small business that prevails in its action may seek partial reimbursement of its legal fees under the Equal Access to Justice Act, and will probably recover if the Government's position is not substantially justified. 28 U.S.C./2412. On the whole, therefore, it does not seem that the sunset of district court jurisdiction will have a material adverse impact on the ability of small businesses to challenge procurement actions.¹⁵

¹³ These are protests by a bidder whose contract award has been canceled due to a bid protest brought by a competitor.

¹⁴ Rule 81(b)(1) makes an attorney eligible to practice if he or she is admitted to practice in the Supreme Court of the United States, or the highest court of any state, territory, possession, or the District of Columbia, or the United States Court of Appeals for the Federal Circuit. Moreover, they can appear *pro se*. Cf. *Meir Dubinsky v. United States*, 43 Fed. Cl. 243 (1999).

¹⁵ One panel member was concerned that the expense of travel and the possibly higher billing rates of D.C. counsel might make CFC litigation more costly to small businesses. However, it is not necessary to be admitted to the D.C. bar to practice before the CFC. If cost is a problem for small businesses, a better solution might be to liberalize the fee recovery provisions of the Equal Access to Justice Act.

Is district court jurisdiction necessary?

Section 12(c) of Public Law No. 104-320, *supra*, charges the General Accounting Office to undertake a study to determine whether concurrent jurisdiction [of the Court of Federal Claims and the district courts] is necessary. The statute poses the question in a way which suggests the answer. As discussed above, the concurrent jurisdiction of the district courts may be desirable for a number of reasons, and there appear to be no clearly significant benefits to termination of that jurisdiction. However, none of the factors examined is so grave as to compel the conclusion that continued jurisdiction is absolutely necessary. And the phrasing of the statute places the burden of proof on those who would continue district court jurisdiction.

Sunset of district court jurisdiction will almost certainly increase the caseload of the Court of Federal Claims in this area. The added responsibility placed on the Court of Federal Claims as the sole judicial forum for such controversies will surely be challenging, but the members of the panel know of no reason why the Court cannot be up to the mark.